In The

Supreme Court of the United States

October Term, 1950

No. 543

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CHARLES ELMORE CROPLEY
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THE HONORABLE RICHARD S. BOOREM, UNITED STATES DISTRICT JUDGE, I. B. ADELMAN, and TIVOLI REALTY, INC.,
Petitioners,

v.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., INTERSTATE CIRCUIT, INC., and TEXAS CONSOLIDATED THEATRES, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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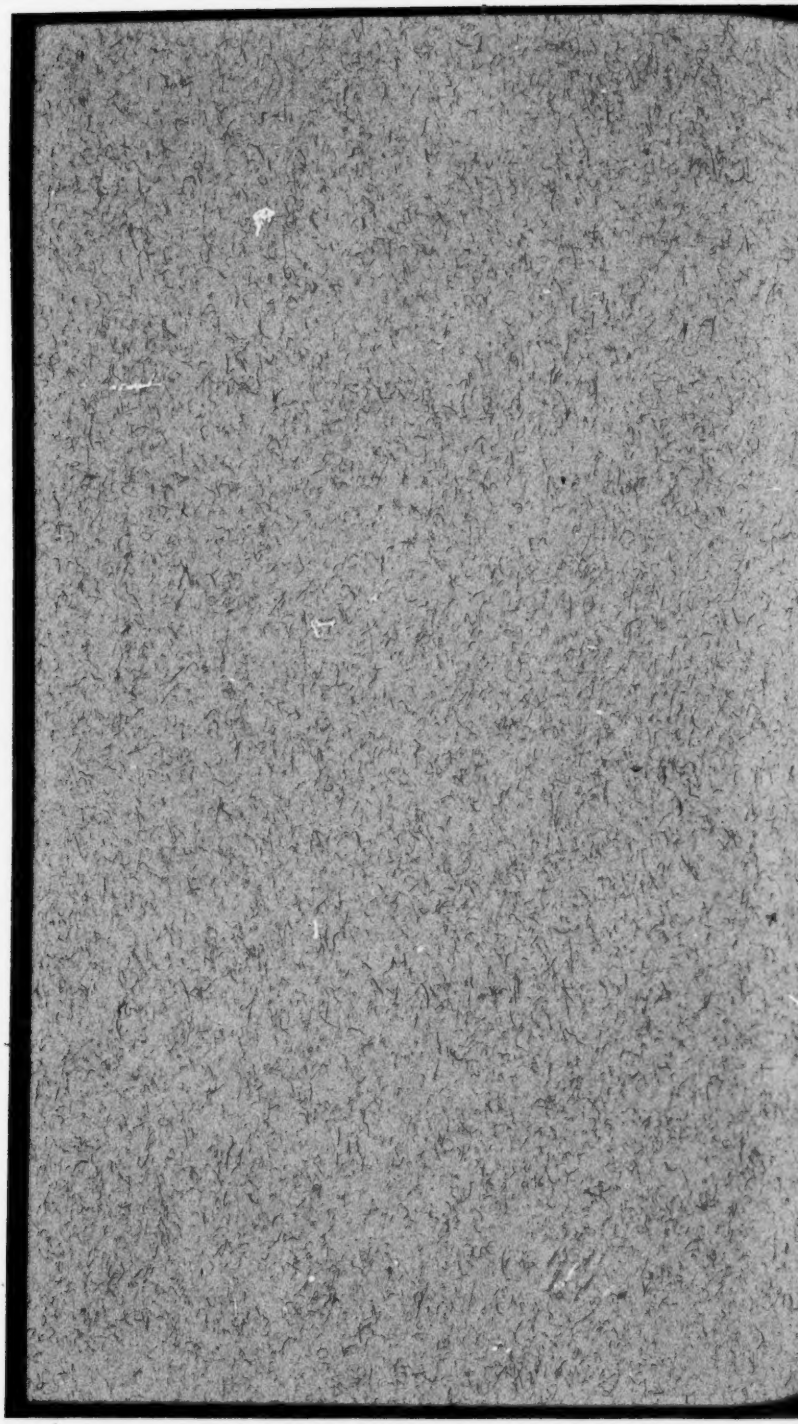

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The Honorable Richard S. Rodney, United States District Judge, I. B. Adelman, and Tivoli Realty, Inc.,

Petitioners,

v.

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, United Artists Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court is reported at 89 F. Supp. 278. The opinion of the Court of Appeals for the Third Circuit (R. 201) is reported at 186 F. 2d 111.

JURISDICTION.

Petitioners seek to invoke the jurisdiction of this Court under 28 U. S. C. 1254(1).

STATEMENT OF THE CASE.

Petitioners, Tivoli Realty, Inc., a Texas corporation operating a motion picture theatre in Dallas, Texas, and I. B. Adelman, a resident of Texas operating a motion picture theatre in Houston, Texas, instituted separate actions in Delaware under the antitrust laws for treble the damages allegedly sustained by such theatres. The fourteen respondents, being all of the defendants in the two cases, moved (R. 26) to transfer each of the two actions to the United States District Court for the appropriate district in Texas, pursuant to Section 1404(a) of 28 U. S. C., which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Petitioners opposed the motions, asserting that the district court in Delaware had no power to transfer the actions because (they claimed) five of the fourteen defendants were not inhabitants of Texas and could not be found there and did not transact business there (R. 65). These five defendants had joined with the others in the motions to transfer. There was no question that the other nine defendants were transacting business in Texas, that the plaintiffs transacted their motion picture businesses solely in Texas, and that any damages to the plaintiffs were sustained in Texas.

The district judge adopted petitioners' argument and held that he was without authority to transfer the cases to Texas. He did not consider the merits of the motions or express any opinion as to whether the cases should be

transferred there for the convenience of the parties and witnesses and in the interest of justice.

Respondents applied to the Court of Appeals for the Third Circuit for writs of mandamus directing Judge Rodney to consider the motions on their merits. That Court directed the district court to vacate its order and to consider on the merits, in the light of the convenience of the parties and witnesses and in the interest of justice, whether the causes should be transferred.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The only question before the Court of Appeals was whether the District Court had power to transfer the cases to Texas if such transfer were found to be for the convenience of parties and witnesses and in the interests of justice.

The Court held that power to transfer existed because:

(1) The Texas District Court had *jurisdiction of the subject matter* of these civil antitrust actions. 28 U. S. C. Section 1337.

(2) *Jurisdiction of the person* of all the defendants could have been obtained in the District Court in Texas, since Section 12 of the Clayton Act (15 U. S. C. 22) provides that in civil antitrust actions against corporations, process may be served in any district in which the corporate defendants may be found.

(3) With the Texas court having jurisdiction of the subject matter and the persons of the defendants, the action "might have been brought" in Texas.

The Court of Appeals concluded, therefore, that, since the action might have been brought in Texas and since the defendants' motions waived any possible objection to Texas venue, the Texas forum should be considered an eligible transferee forum by the District Court.

QUESTION PRESENTED.

The only question properly before this Court on the application for certiorari is the correctness of the holding of the Court of Appeals on this issue of power. Properly stated the question should read:

Does a district court have power under Section 1404(a), on motion made by all of the defendants, to transfer an antitrust action to another district court for the convenience of parties and witnesses and in the interests of justice, the transferee forum having jurisdiction of the subject matter and all of the defendants being subject to service of process issued from that court?

In petitioners' statement of "Questions Presented," the first question is incorrectly stated and the second is not in the case. Both are based on the erroneous premise that defendants would not have been amenable to process issued from the Texas court; a premise which, as held by the court below, runs directly counter to Section 12 of the Clayton Act (15 U. S. C. 22), which specifically provides that process may be served on a corporate defendant in any district in which it is an inhabitant, or wherever it may be found.

> *United States* v. *Scophony Corporation,* 333 U. S. 795 (1948).

The third question in petitioners' statement of "Questions Presented" is likewise not before the Court. The decision of the Fifth Circuit in the earlier Tivoli Realty action was held by the Third Circuit to be irrelevant to the issues before it since Section 1404(a) was not in effect at that time. It clearly has no bearing on the question of *power* of the court under Section 1404(a).

REASONS FOR DENYING THE WRIT.

1. The Decision Below Was Correct on the Merits.

The doctrine that venue is a personal privilege which a defendant is free to waive at his option is one of long standing in this Court. *General Intvestment Company* v. *Lake Shore Ry. Co.*, 260 U. S. 261; *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653; *Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165; *Hoiness* v. *United States*, 335 U. S. 297. If the privilege is not seasonably asserted, it is waived. *United States* v. *Hvoslef*, 237 U. S. 1.

If a defendant fails to appear in the action and assert the privilege, a court having jurisdiction over the subject matter and of the parties may enter judgment against the defendant by default. *Commercial Insurance Co.* v. *Stone Co.*, 278 U. S. 177.

The Adelman and Tivoli suits being based on the antitrust laws, the district courts in Texas clearly had jurisdiction over the subject matter. Under Section 12 of the Clayton Act (15 U. S. C. 22) process issuing from the Texas courts could have been served on the defendants not only in Texas but wherever they could be found. In fact, in the Adelman and Tivoli cases, the ones now before the Court, four of the defendants were served in *New York* with process issued from *Delaware* under this statute.[1]

The distinction between the provision relating to venue contained in Section 12 of the Clayton Act and the provision for obtaining personal jurisdiction by service of process contained in the same section was recently recognized by this Court in two decisions. In *United States* v.

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[1] In the argument made herein respondents have assumed, as did the court below, that five of the defendants were not transacting business in Texas. On this issue, which was controverted below, the Court of Appeals said (Footnote 3): "On the instant record there would seem to be as much basis for a conclusion that the five defendants referred to were transacting business in Texas as for the conclusion that the four New York corporations were transacting business in Delaware. In the view we take of the cases at bar it is unnecessary to determine this fact issue."

National City Lines, Inc., 334 U. S. 573, at 577-78 (1948), the court stated:

> "It is not disputed that the District Court has jurisdiction in the basic sense of power to hear and determine the cause or that it has venue within the provisions of § 12. Nor can it be questioned that any of the defendants can be brought personally within that court's jurisdiction by service of process made in accordance with the provisions of either § 12, or those of § 5 of the Sherman Act."

And, in *United States* v. *Scophony Corporation*, 333 U. S. 795, at 802 (1948) the same distinction was observed:

> "Section 12 of the Clayton Act has two functions, first, to fix the venue for antitrust suits against corporations; second, to determine where process in such suits may be served. Venue may be had 'not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business.*' And all process may be served 'in the district of which it is an inhabitant, or wherever it may be found.' (Emphasis added)"

If the Adelman and Tivoli suits had been filed in Texas and the defendants had been served with process pursuant to Section 12, they would have had to appear and defend to avoid the entry of a default judgment. Where a suit filed in Texas can have such a result, it can hardly be said that it "could not have been brought" there.

Since the defendants would necessarily have had to appear to protect their interests, they would have had the privilege of objecting to, or waiving, venue in the Texas forum. The Court of Appeals held that the same privilege is available for purposes of Section 1404(a). By joining in the motion to transfer, all of the defendants have waived all objection to the Texas venue. There is no reason why such a waiver should be less effective for purposes of Section 1404(a) than if made in a suit originally brought in the Texas forum.

In so construing Section 1404(a), it is submitted that the Court of Appeals was clearly right.

2. The Decision Below is Not in Conflict With the Decision of Any Other Appellate Court.

The cases to which petitioners refer are not in conflict with the decision below.

(a) The first case cited is *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (2nd Cir., May 3, 1950). That was a "diversity" case in which:

(1) the *plaintiff* moved to transfer

(2) to a state where the courts could not have obtained jurisdiction over the person of the defendant.

The defendant corporation there was not subject to service of process in California. Congress not having authorized process in diversity cases to run throughout the country (as it has in the case of corporate defendants in antitrust actions under Section 12 of the Clayton Act), the California courts could not have obtained jurisdiction over the person of the defendant. The Second Circuit held that it was not the purpose of Section 1404(a) to extend the scope of the process of a district court; and that on the plaintiff's motion a case could not be transferred to a court which could not have obtained jurisdiction over the person of a defendant. The case had nothing to do with venue since venue was proper in both forums.

The *Foster-Milburn* case, therefore, has no application to a situation where the motion to transfer is made by all of the *defendants*, and where the defendants could have been summoned in the transferee forum by out-of-state service of process.

That the Second Circuit did not pass upon the question which was before the Third Circuit in the present cases is clear from *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (May 8, 1950). In that case one defendant who joined in the motion to transfer was in the same situation as the five defendants in the present cases. The case was decided on grounds not

pertinent here, but in a footnote to the opinion it was stated:

> "Because of the reasons given for our decision, we have not considered whether § 1404(a) authorizes a transfer in these circumstances: Venue as to Sherman Tractor Co., one of the important defendants, does not exist in the Michigan District, but that defendant has joined in the motion for transfer." (p. 332)

If (as petitioners contend) the question had been decided on May 3, 1950, the Court would not have reserved the question in an opinion rendered five days later.

(b) The next case cited by petitioners is *Shapiro* v. *Bonanza Hotel Company,* 185 F. 2d 777 (9th Cir., Dec. 14, 1950). The *Shapiro* case dealt with the identical fact situation presented in the *Foster-Milburn* case. *Plaintiff* moved to transfer a diversity action to a state where personal jurisdiction could not have been obtained over a defendant who *opposed* the transfer. The court held that transfer would not be proper, clearly limiting its decision to the impropriety of transfering an unwilling defendant to a court which could not, by service of process, have obtained personal jurisdiction over it. The court quoted at length from the opinion in the *Foster-Milburn* case and agreed with the interpretation there placed upon Section 1404(a) by the Second Circuit.

(c) Nor is there any merit to the contention that the decision below conflicts with the decision of the Fifth Circuit in *Tivoli Realty, Inc.* v. *Interstate Circuit, Inc.,* 167 F. 2d 155 (1948), cert. den. 334 U. S. 837 (1948). That case was decided before the enactment of Section 1404(a), and had nothing to do with the question of power to transfer pursuant thereto. In that case suit was filed in Texas to enjoin the prosecution in Delaware of the present Tivoli action. The trial court granted the injunction. The Fifth Circuit reversed, holding that, as a matter of comity, one United States District Court should not interfere by injunction with a suit in another Federal District Court where the alleged inequity was based solely on the ground

of inconvenience; and that, in any event, the judicially created doctrine of *forum non conveniens* was not applicable to antitrust cases. The latter view was subsequently adopted by this Court in *United States* v. *National City Lines*, 334 U. S. 573. Since the rule of those cases has been changed by the adoption of Section 1404(a), the court below properly treated the earlier decision of the Fifth Circuit as irrelevant to the issues here presented. See *Ex parte Collett*, 337 U. S. 55; *United States* v. *National City Lines*, 337 U. S. 78. The two decisions are not in conflict.

(d) Similarly, there is no inconsistency between the decision below and the holding, or even the language, of *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501 (1947). That case, too, was decided before the enactment of Section 1404(a) and merely held that the action had properly been dismissed under the older judge-made rule of *forum non conveniens*.

(e) While a conflict between the decision of the Third Circuit and the decisions of the district courts, if it existed, would be immaterial on an application for certiorari, the fact is that the district court decisions on the issue here presented are in accord with the holding below.

> *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45 (S. D. N. Y., 1950); *Glasfloss Corp.* v. *Owens-Corning Fiberglass Corp.*, 90 F. Supp. 967 (S. D. N. Y., 1950).

Moreover, in *Shore Amusements* v. *Paramount Pictures, et al.* (Civil Action No. 1120-47, District of Columbia, June 15, 1949), Judge Holtzoff transferred an antitrust action from the District of Columbia to Delaware over the objection of two of the defendants that venue in Delaware would have been improper as to them.

3. There is No "Confusion" in the Lower Courts on the Question Decided Below.

Petitioners cite (Brief, p. 11) several lower court decisions in an effort to show that some confusion exists in the

interpretation of Section 1404(a). While some divergence of opinion among the courts may be expected in the interpretation of any new statute, examination of the cases demonstrates that the divergence is not nearly as great as petitioners assert and, further, that there is no conflict whatever among them on the issue decided by the court below and presented by this application.

1. *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (2nd Cir., 1950) is cited as holding that under § 1404(a) "a case cannot be transferred to a district in which defendants are not amenable to process even though the venue is proper." *The case does not so hold.* There plaintiff sued, in New York, a Wisconsin corporation whose factory was located in Milwaukee. On defendant's motion, the trial judge transferred the case to Wisconsin. Defendant was clearly amenable to process in Wisconsin. The Court of Appeals merely held that the order of transfer was not appealable.

2. The following cases are cited for the proposition that "a case cannot be transferred to an improper venue under . . . § 1404(a)". Not one of them so holds.

In *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.*, 90 F. Supp. 645 (Dist. of Col., 1950), the court, without making any reference to Section 12 of the Clayton Act, held that the defendants were not doing or transacting business in Virginia and consequently the action could not have been maintained there. The court then assumed arguendo, that the case might properly be transferred and denied the motion to transfer because ". . . it is the decision of this court that the convenience of the parties and a substantial number of witnesses, as well as the interests of justice, would be served by a trial of this action in the jurisdiction of the plaintiff's choice" (p. 647).

Masterpiece Productions, Inc. v. *United Artists Corp.*, 90 F. Supp. 750, 94 F. Supp. 116, (E. D. Pa., 1950), was a diversity case. Plaintiff, a New York corporation, sued

United Artists Corporation, a Delaware corporation, joining Magnus Films, another New York corporation, as involuntary plaintiff. United Artists moved to transfer to New York. If plaintiff had sued in New York, Magnus would have been a defendant, and so the necessary diversity would not have existed. Since United Artists had its principal office in New York (90 F. Supp. 750), obviously *venue* of an action against it would have been proper in New York. The reason the transfer was denied was that the proposed transferee forum lacked diversity *jurisdiction of the subject matter* (90 F. Supp. at 751). On reargument (94 F. Supp. 116) Judge McGranery adhered to this view—properly, it is submitted—but added that in any event the motion on its merits did not make out a fact case for transfer.

United States v. *91 Packages* (D. N. J., 1950, 19 L. W. 2203, was an action *in rem,* and the court correctly held that it could not be transferred to a district where *jurisdiction of the subject matter* could not be obtained. Venue was not involved.

In citing these last cases, petitioners have continued to confuse *jurisdiction* and *venue.* Only by such a confusion of concepts, which signally failed in the Third Circuit, can petitioners hope to make out a case for the granting of certiorari.

3. Petitioners cite (Brief, p. 11) *Ferguson* v. *Ford Motor Co.,* 89 F. Supp. 45 (S. D. N. Y. 1950), as holding that transfer is proper where venue as to one or more defendants is proper in the transferee forum and all defendants, by joining in the motion, waive any question of venue. It does so hold, as does also *Glasfloss Corp.* v. *Owens-Corning Fiberglas Corp.,* cited above. These cases are, of course, in complete harmony with the Third Circuit decision involved here.

4. Petitioners cite as an example of "confusion" *United States* v. *23 Gross Jars,* 86 F. Supp. 824 (N. D. Ohio, 1949). That decision is another case like *91 Packages, supra,*

where transfer to a forum which lacked *jurisdiction* of the *subject matter* was held improper.

5. Finally, petitioners misstate the holding below (Brief, p. 11). It is said that the Third Circuit held that an action "may be transferred to any other district (under § 1404(a)) . . . regardless of venue or amenability to process." Yet one of petitioners' "Specifications of Error" challenges the statement of the Third Circuit "that there was no question of respondents' amenability to process in Texas." (Brief, p. 8).

Thus there is no confusion whatsoever among the cases on the question decided by the Third Circuit now that the erroneous ruling of the District Court in these actions has been corrected by the Court of Appeals. The major confusion in the case is to be found in the failure of petitioners to distinguish between the concepts of *jurisdiction of the subject matter, jurisdiction of the person,* and *venue.* It was the jumbling of these separate concepts, induced by plaintiffs, that led Judge Rodney into error. The clear analysis by the Third Circuit handles the concepts precisely and correctly.

Petitioners' final plea may be described as a sort of spurious class action for plaintiffs generally. But it is clear that the ruling of the Third Circuit does not put plaintiffs, as a class, in any dilemma. The plaintiff is merely subject to the decision of an impartial court as to where the action should be tried. All the cases establish that his choice of forum will be disturbed only on a showing, with the burden on the moving defendant, that trial in the transferee forum will be more convenient for parties and witnesses and in the interests of justice. The argument that this gives the defendant a "choice of the forum" was answered as follows by the court below:

> "On the contrary our decision puts in the hands of an impartial federal tribunal the determination as to where the suits can best be tried."

The decision here recognizes, as Judge Maris has commented elsewhere, that some of the most significant advances accomplished by the Judicial Code of 1948 "are in the direction of the further integration of the federal judicial system" (Preface, 28 U. S. C. A. v). The holding below gives Section 1404(a) the construction which makes it a flexible and effective device for preventing the arbitrary and oppressive selection of an inconvenient forum by the plaintiff, and it vests power to determine the place of trial in the one impartial force in the courtroom; the district judge. The decision is in accord with logic, with precedent, and with the public interest; is not in conflict with any other decision; and furnishes no basis for the grant of certiorari.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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